Supreme Court, U.S.
FILED
MAR 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1203

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

COMMONWEALTH OF KENTUCKY, - - Petitioner,

versus

GEORGE W. PETERSON, - - -- Respondent,

On Petition For A Writ of Certiorari To The
Court Of Appeals Of Kentucky

BRIEF FOR THE RESPONDENT IN OPPOSITION

G. WILLIAM BAILEY, JR.
PATE & BAILEY
Attorneys at Law
123 West Dixie Avenue
P.O. Box 248
Elizabethtown, Kentucky 42702-0248
(502) 769-2379

Counsel of Record for Respondent

Please serve:

G. WILLIAM BAILEY, JR., ESQ.
PATE & BAILEY
Attorneys at Law
P.O. Box 248
Elizabethtown, Kentucky 42702-0248
(502) 769-2379

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 2251, LOUISVILLE, KY.

QUESTIONS PRESENTED

I.

Should this Court grant certiorari to review an unpublished opinion of the Court of Appeals of Kentucky which reversed the assault, second degree conviction of Respondent on grounds of double jeopardy, collateral estoppel and due process violations?

II.

Should this Court grant certiorari to review an unpublished opinion of the Court of Appeals of Kentucky which reversed the assault, second degree conviction of Respondent because of an erroneous jury instruction on the aforesaid charge which had been previously dismissed by written order of the trial court with the consent and agreement of Petitioner?

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COMMONWEALTH OF KENTUCKY, - - - *Petitioner,*

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GEORGE W. PETERSON, - - - - *Respondent,*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE
STATEMENT OF THE CASE

Respondent, George W. Peterson, was indicted, tried and acquitted of both the murder of Bradley Pruitt *and* of complicity to murder Bradley Pruitt. Thereafter, Respondent was indicted for the attempted murder and assault of Bradley Pruitt which occurred four days prior to his death. (TR 83 CR 1623 at 104-105) and (85 CR 0888).

Following a jury trial on the second indictment Respondent was acquitted of the attempted murder charge, but he was convicted of assault, second degree, which charge had been previously dismissed *by written order of the trial court with the consent and agreement of Petitioner.* (TR 85 CR 0888 at 76-109).

The previously dismissed charge of assault, second degree was presented to the jury as a lesser-included offense instruction over the objections of counsel for Respondent. (TR 85 CR 0888 at 86-109).

The Court of Appeals of Kentucky reversed the conviction of Respondent for assault, second degree, in an unpublished opinion rendered on September 15, 1989, on grounds of double jeopardy, collateral estoppel, due process violations and erroneous jury instructions.

The Supreme Court of Kentucky denied discretionary review of the unpublished opinion of the Court of Appeals of Kentucky by order entered on November 22, 1989.

The Kentucky Rules of Civil Procedure, which are also applicable to criminal appeals, provide at Rule 76.28(5) that unpublished opinions of the Kentucky appellate courts are not to be cited or used as authority in any other case in any court of the Commonwealth.

PART TWO

SUMMARY OF ARGUMENT

Respondent respectfully asserts and contends that it is a violation of his double jeopardy and due process rights guaranteed under the United States and Kentucky Constitutions to subject him to criminal prosecution for alleged criminal conduct which had resulted in a previous indictment, jury trial and verdict of acquittal.

Respondent further asserts and contends that it is a violation of his double jeopardy and due process rights guaranteed under the United States and Kentucky Constitutions to convict him of a criminal charge which had been previously dismissed by written order of the trial court with the consent and agreement of Petitioner.

PART THREE

ARGUMENT FOR DENYING THE WRIT OF CERTIORARI

I. The Court of Appeals of Kentucky Correctly Held That Respondent's Acquittal of the Murder and Complicity to Murder Charges Immunized Him from Prosecution on the Attempted Murder and Assault, Second Degree Charges.

Respondent respectfully submits that the Court of Appeals of Kentucky properly reversed his conviction for assault, second degree in its unpublished opinion rendered on September 15, 1989, and under Kentucky law this opinion cannot be cited as precedent in any other case and is applicable to only the very unusual factual circumstances of this case. CR 76.28(5).

Following a jury trial Respondent was acquitted of the separate charges of murder *and complicity to murder* Bradley Pruitt, and at that trial Petitioner introduced extensive evidence attempting to prove that Respondent and Deborah Pruitt were engaged in an ongoing plan and conspiracy to murder Bradley Pruitt during the period from February 5, 1983 through February 20, 1983, and including the assault incident which occurred on February 16, 1983.

KRS 502.020(1) defines the crime of complicity as follows:

> A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense.

The Court of Appeals of Kentucky correctly held that since Petitioner introduced extensive evidence at Respondent's murder and complicity trial concerning the February 16, 1983 assault in an attempt to prove the conspiracy needed to obtain a complicity conviction, Respondent's acquittal of that complicity charge immunized him from prosecution on the attempted murder and assault, second degree charges arising out of the February 16, 1983 incident.

Petitioner's reliance on *Dowling* v. *United States,* No. 88-6025 (decided January 10, 1990) is misplaced, because at the murder and complicity trial Respondent was charged with, and tried under Kentucky law for, the *separate crime of complicity to murder Bradley Pruitt,* and a conviction of this crime required proof beyond a reasonable doubt. It was not an *uncharged crime* which requires a lesser standard of proof to be admissible under Kentucky law.

The Court of Appeals of Kentucky relying on KRS 505.040; *Sherley* v. *Commonwealth,* Ky., 558 S.W. 2d 615 (1977); *Marshall* v. *Commonwealth,* Ky., 625 S. W. 2d 581 (1982); *Benton* v. *Maryland,* 395 U.S. 784 (1969); *Brown* v. *Ohio,* 432 U.S. 161 (1977); *In Re: Nielsen,* 131 U.S. 176 (1889); and *Ashe* v. *Swenson,* 397 U.S. 436 (1970), correctly held that since the Commonwealth had ". . . tried appellant (Respondent) for murder and complicity to murder based upon the entire sequence of events transpiring over a several-day period . . . it is . . . precluded from relitigating each of those factual events in a singular manner".

Respondent's acquittal of the separate charges of murder and complicity to murder at the first trial immunized him from prosecution on the later indictment for attempted murder and assault, second degree arising out of the February 16, 1983 incident. Respondent had been subjected to

jeopardy on the complicity charge at the first trial, and he could not thereafter be lawfully prosecuted for that same alleged criminal conduct.

II. The Court of Appeals of Kentucky Correctly Held That Respondent Could Not Be Lawfully Convicted of a Criminal Charge Which Had Been Previously Dismissed by Written Order of the Trial Court With Agreement of the Parties.

Respondent further respectfully submits that the Court of Appeals of Kentucky correctly held that it was a violation of his due process/fundamental fairness rights to convict him of a charge that had been previously dismissed by the trial court upon agreement of the parties.

Count 2 of the second indictment charged Respondent with the assault, second degree of Bradley Pruitt which allegedly took place on February 16, 1983, and upon motion of Petitioner and agreement of Respondent the trial court dismissed this count *by written order.*

The Court of Appeals of Kentucky in its opinion rendered on September 15, 1989 held that ". . . [s]uch an agreement presupposes that the appellant (Respondent) is not to be subjected to prosecution for the same charge but thrust at him in a different manner".

The Supreme Court of Kentucky, which denied discretionary review of this case, has consistently required the Commonwealth to adhere to its agreements. In *Workman* v. *Commonwealth,* Ky., 580 S.W. 2d 206 (1979) and *Johnson* v. *Commonwealth,* Ky., 609 S.W. 2d 360 (1980), both cited by the Court of Appeals in its opinion, the Supreme Court of Kentucky reversed criminal convictions for failure of the Commonwealth to adhere to its agreements. The Court in *Workman, supra,* stated that ". . . in the last

analysis we find it less evil that a criminal should escape punishment than that the government should be allowed to welsh on its bargain". *Id.* at 207.

The validity and enforceability of such agreements have also been recognized by this Court in *Santobello* v. *New York,* 404 U.S. 257 (1971) and *Ricketts* v. *Adamson,* 483 U.S. 1 (1987).

The Court of Appeals of Kentucky, in upholding the agreement entered into by the parties and confirmed by the trial court, found and held in its opinion that Respondent's conviction for assault, second degree, ". . . being a charge (count) of the indictment which had been dismissed, clearly violates appellant's (Respondent) double jeopardy/due process rights".

This judgment is not only legally correct, it is fair and just. It should not be distributed by this Court.

PART FOUR

CONCLUSION

This Court should deny Petitioner's request for the issuance of a Writ of Certiorari to the Court of Appeals of Kentucky because it is manifestly clear that the federal questions presented to this Court for review were correctly decided under the precedents of this Court and of the Supreme Court of Kentucky which do not conflict with any applicable decisions of this Court.

Respectfully submitted,

PATE & BAILEY
Attorneys at Law
123 West Dixie Avenue
P.O. Box 248
Elizabethtown, Kentucky 42702-0248
(502) 769-2379

By: _____
G. WILLIAM BAILEY, JR.
Counsel of Record for Respondent

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G. WILLIAM BAILEY, JR., ESQ.
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